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8 ROT VAN NGUYEN,
9 Petitioner,

10 v.
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12 MATTHEW CATE, Warden,
13 Respondent.
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16 Case No. 12-616 WHO (PR)
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**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
DENYING CERTIFICATE OF
APPEALABILITY**

INTRODUCTION

19 In 2009, a jury in the California Superior Court for the County of Santa Clara found
20 petitioner Rot Van Nguyen guilty of two felony counts of lewd acts upon a child under 14
21 years of age (Cal. Penal Code §288(a)), and one misdemeanor count of prowling and
22 peeking (Cal. Penal Code § 647(i)). Nguyen received a sentence of eight years and eight
23 months in state prison. On direct appeal, the California Court of Appeal affirmed the
24 conviction, and the California Supreme Court denied review. Nguyen seeks federal habeas
25 relief from his state convictions. Because the record does not reflect that there was jury
26 coercion, a due process violation, or ineffective assistance of counsel, and because the jury
27 instructions would have cured the cumulative problems alleged by Nguyen if any had
28 occurred, the petition for habeas relief is DENIED.

1 BACKGROUND

2 The following factual background is taken from the order of the California Court of
3 Appeal:

4 *A. Evidence*

5 *1. Prosecution Case*

6 T., the female victim, turned 15 years shortly before testifying at trial in
7 June 2009. She lived in a house with her mother and three half brothers,
8 who were related to her through their mother. She had her own
9 bedroom. At the time of trial, her older half brother was 19 years old, a
10 younger half brother was five years old, and her youngest half brother
11 was one year old and she referred to them as brothers in her testimony.
12 Defendant was the father of her five-year-old half brother. Between
13 2005 and 2007, defendant was in and out of T.'s house.

14 In the summer of 2007, T. was living in the same house and had the
15 same bedroom. Her mother and defendant were dating and defendant
16 would come and go from their house. In June 2007, after the school
17 year at her middle school ended and while her mother was in Vietnam,
18 defendant touched her more than once in her bedroom.

19 With respect to the first occasion of inappropriate touching in June
20 2007, T. had gone to bed in the evening and had closed but not locked
21 her bedroom door. She awoke around six or seven in the morning and
22 found defendant in his boxer shorts, lying behind her. She was lying on
23 the bed on her left side, facing the door. She could feel his erect penis
24 pressed against her buttocks and she could hear him breathing hard.
25 Defendant touched her over her pajamas on her legs and her breasts.
26 She felt his hands on her skin touching her waist. When she asked him
27 what he was doing in her room, he claimed to be watching the TV,
28 which was on, even though he was not facing it. He rubbed her right
breast for a couple of minutes. She ran out of her room and went to her
oldest brother's room, where he was sleeping. T. was crying but she did
not tell her brother what happened because she was scared. She lay
down and slept on his floor.

The following night, T. went to bed in the evening and closed and
locked her bedroom door. She awoke around six or seven in the
morning and again found defendant lying behind her. Defendant again

touched her legs going up toward her waist and her breasts. There was skin-to-skin contact when he touched the side of her waist. The next night, T. went to bed around the same time and closed and locked her bedroom door. When she awoke around six or seven in the morning, she found defendant behind her for the third time. He again touched her; he touched her legs, face and breasts.

The victim indicated that the lock on her bedroom door could be opened with either a knife or a screw. After both the second and third touching incidents, she ran into her brother's room and slept on his floor but did not tell him what happened.

Later in the day of the third incident, T. disclosed what happened to her older female cousin, who was about 19 or 20 years old at the time of trial. The cousin was shocked and scared and advised her to tell her older brother.

When T. returned home that night after seeing her cousin, she went into her bedroom, turned on the light, and found defendant on the floor of her room. They made eye contact but he did not say anything to her and she walked out of her room and went to her older brother's room. She told him about defendant touching her in her room and he reacted angrily. He instructed her to pack her belongings and told her she was going to stay at his friend's house for the night. He made arrangements for her to stay with a male friend.

T. did not immediately report what happened in June 2007 to the police because her brother and she were scared of what defendant would do. She explained that she was afraid of defendant because of what he had done and because he had threatened her mother, her brother, and her. She recalled an incident in about May or June 2005 when she awoke to a “loud slap noise” and saw defendant “slapping [her] mom on the face and punching her in the face.” Defendant had said he would kill her mother and had followed her mother into the restroom holding a knife. She had been scared. He also had threatened to kill both her brother and her at the same time.

During another incident when she was elementary school age, T. was staring at defendant because he was yelling at her mother. Defendant became angry with her because she was staring at him and tried to attack her with the remote control.

On another occasion, defendant threatened to kill T.'s mother.

1 T. also remembered seeing, in about August 2005, a dent in her
2 mother's door. Defendant had thrown an axe at the door because he
3 wanted her mother to open the door. He was not supposed to be at their
4 home because there was a restraining order against him. She did not see
the incident but she was told about it by her mother.

5 After the touching incidents in June 2007, the victim told her mother
6 what happened over the phone; her mother was shocked and told her to
7 stay with her father. T. stayed with others until her mother returned
from Vietnam about two months later.

8 At some point, she learned from her brother that his friend had seen
9 defendant going through her drawers. One day, she returned home to
10 retrieve some of her belongings. Her dresser drawers were open and she
found a pair of her panties that had been ripped or cut. That scared her.

11 When her mother returned home, T. went back home. Defendant was
12 still there but he did not touch her again.

13 Defendant engaged in other conduct, however, that shocked and scared
14 T. He peeked at her through her bedroom window several times. When
15 the window blinds were open, defendant popped up at her window and
16 looked in while she was changing her clothes or after she emerged from
the shower and wearing towel. He never saw her completely naked.

17 On November 25, 2008, T. spoke with a counselor at her high school
18 because she could not take any more. Defendant had peeked at her
19 through her window about a week earlier. Later that same day, she
talked to Officer Todd at the school.

20 Carl Lewis, formerly a senior criminal investigator with the District
21 Attorney's Office, Bureau of Investigation and now a consultant, was
22 recognized by the court as an expert on the behaviors of children
23 disclosing sexual abuse and on the Child Sexual Abuse Accommodation
24 Syndrome (CSAAS). Lewis stated that "30-plus years of research and
25 practical experience" have shown that it is not true that "any child who
26 is being molested would immediately cry out or tell someone to try to
get it to stop." In the overwhelming majority of cases that he had
investigated there was a delay between the abuse and the time the child
is first able to talk about it.

27 Lewis explained the five elements of the CSAAS, which are (1) secrecy,

1 (2) helplessness, (3) entrapment and accommodation, (4) delayed,
2 conflicted, unconvincing disclosure, and (5) retraction. These five
3 categories merely describe how children typically reacted differently
4 than common expectations; they are not symptoms of abuse. The
syndrome was intended to be used to educate and dispel erroneous,
preconceived ideas about how child molestation victims behave.

5 As to secrecy, Lewis stated that the molestation or sexual abuse of a
6 child “occurs almost exclusively when the offender is alone or somehow
7 isolated with the child.” In most cases, an offender will either create or
8 take advantage of some opportunity of secrecy “such as waiting until
9 everybody else has left the house, waiting until everybody else is asleep,
maybe going to a secluded area, closing or locking a door, turning up a
television to muffle any sounds.” A sense of secrecy is created also
because sexual abuse of a child “carries with it a great societal taboo.”
The secrecy means only the child and the molester know that
molestation is occurring and “there are great consequences for betraying
that secret.” The child’s sense of shame or embarrassment may have a
role in maintaining the secrecy.

13 Lewis described the process of “grooming” a child victim, which can
14 reinforce the secrecy. The process involves a molester taking steps to
lower a child’s inhibitions and create a sense that sexual behavior with
the child is normal. It may involve gradually more invasive touching
that eventually includes full molestation or showing child pornography
to the child. The grooming process may involve making the child feel
special. It may involve threats or rewards.

18 The second element of the syndrome, helplessness, refers to the fact that
19 children in our society are dependent upon adults and may be dependent
upon the molester. Consequently, the disclosure process often occurs
20 over time and “a child might let out a little bit of information to see
what the adult reaction is, and then, depending upon that adult reaction,
21 may feel more comfortable in letting out additional information.” The
child might express a desire not to be left with the offender but not
explain the reason. Thus, the information may come out in bits and
22 pieces, may be inconsistent, and may not be understood by the
nonoffending caretaker, which often serves to reinforce the child’s sense
of helplessness. In addition, a child may inaccurately believe that the
23 nonoffending caretaker has a close relationship with the offender and
would tend to believe the offender over the child or that the
nonoffending caretaker already knows what is going on.

1 Entrapment and accommodation, the third element of the syndrome,
2 refers to the typical response of a child that is trapped in a sexually
3 abusive situation, which is to try to put up with, or accommodate, their
4 situation. The most common accommodation is to try “very hard to act
5 as if nothing is wrong” and, if asked, to deny anything is wrong. The
6 child may be fearful of the outcome of disclosing the abuse, such as
7 suffering further abuse, getting in trouble, angering or emotionally
8 hurting a nonoffending caretaker, or breaking up the affected unit, such
9 as a family or scout troop. The child’s fear reinforces the child’s sense
10 of being trapped.

11 The fourth element is delayed, conflicted, and unconvincing disclosure.
12 Disclosure often occurs some time after the sexual abuse because the
13 child is not immediately able to talk about it; delay does not mean that a
14 child’s claim of abuse is invalid. The child may experience an internal
15 conflict over disclosing the sexual abuse because of the unknown result
16 of disclosure and this conflict may add to the delay. The child’s
17 statements may conflict because the child reveals information in pieces
18 over time.

19 The last element, retraction, refers to partial or complete repudiation of
20 a disclosure of sexual abuse. Retraction may occur when “disclosure
21 brings about a great deal of chaos in the child’s life” or “focus on the
22 child’s family, the child’s life.” The intensity of the chaos or focus may
23 cause the child to minimize or retract an earlier disclosure in an effort to
24 decrease that intensity or return to how things were before.

25 Lewis made clear that the CSAAS is not a diagnostic tool. The
26 syndrome is meant to convey the message that one should not make a
27 snap judgment that sexual abuse did not occur based on preconceived
28 ideas about child abuse. Lewis stated that the syndrome “is not a gauge
that can be applied to any particular case.” He made clear that the
CSAAS cannot help to differentiate a valid claim of sexual abuse from a
fabricated claim. He acknowledged that Dr. Roland Summit, the
psychiatrist that first identified the syndrome and coined the term,
became concerned that the syndrome was being misused to prove sexual
abuse and had written articles about such misuse.

29 Darlene Rae Garcia, who was a social work intern at T.’s high school,
30 met with her on November 25, 2008. T. was crying and
31 hyperventilating. Eventually, T. revealed that she felt threatened by her
32 mother’s ex-boyfriend. She told Garcia that she was afraid she would
33 get into trouble if she said anything to them and he had threatened to kill
34

1 or hurt her family. She disclosed that, in the summer of 2007, she had
2 been molested by the ex-boyfriend. She awoke to find him next to her
3 and he rubbed his penis against her buttocks and rubbed her breast. She
4 also told Garcia that, when she was not sleeping at home, her brother's
5 friend had slept in her bed and had seen the ex-boyfriend walk into her
6 room and smell her undergarments. T. said that, on several occasions,
7 she had caught the ex-boyfriend looking through her window while she
8 dressed or after she had gotten out of the shower.

9
10 Before the People rested, the parties' stipulation was read to the jury. It
11 provided: 'In 2005, the defendant pled no contest to and was convicted
12 of misdemeanor violation of Penal Code Section 242-243 (e), battery,
13 arising out of acts that took place in May 2005. [¶] In 2006, the
14 defendant pled no contest to and was convicted of a misdemeanor
15 violation of Penal Code Section 594(a)(b)(2)(A), vandalism, and a
16 felony violation of Penal Code Section 273.6(d), violation of restraining
17 order preventing defendant from threatening, harassing, assaulting,
18 battering, contacting, or disturbing the peace of [T.'s mother], where the
19 violation involved an act of violence and credible threat of violence.
20 These convictions arose out of acts that took place in August 2005.'

2. *Defense Case*

21 San Jose Police Officer Vernon Todd was working at T.'s high school
22 as a school security officer on November 25, 2008. He interviewed T.
23 that day. He knew that a sexual assault detective would follow up.

24 Officer Todd remembered that T. described three incidents of sexual
25 touching that had occurred the preceding summer while her mother was
26 in Vietnam. T. said that, during the first incident, she awoke to find
27 defendant rubbing his penis against her buttocks. According to Todd,
she said that his penis was exposed but his erect penis did not touch her
skin. She did not mention that defendant was in boxers or that he
touched her legs, waist, or breast area. T. told him that, during the
second incident, she woke up to find defendant rubbing her breast over
her clothing. The officer did not recall her mentioning that defendant
touched her legs or waist. His report indicated that the second incident
occurred the following night. T. told him that, during the third incident,
defendant pulled up her shirt and rubbed her back with his hands.
According to Officer Todd, she did not say that he touched her breasts,
waist, or legs. The officer also testified that T. reported two peeping
incidents that had occurred two days in a row, approximately two weeks

1 before their interview.

2 Hyong Nguyen, a social worker with the Department of Family and
3 Children Services, met with T. at the high school on November 25,
4 2008 after T.'s interview with San Jose police officers. The officers
5 informed Nguyen of the situation and she did not ask T. about the
6 molestation. The social worker's questions were directed at "the
7 welfare and the safety of the minor in the home of the parents." T., who
8 was very emotional and tearful at times, told her that there was a
9 domestic violence incident involving defendant and her mother in 2005
10 and a restraining order was obtained. Nevertheless, defendant still came
11 and went from their home as he pleased.

12 Kevin Le, a 19-year-old friend of T.'s older brother, testified that they
13 had been friends for about a year and a half and he had visited their
14 home 20 to 30 times. Le asserted that he had never been in T.'s
15 bedroom. Le stated that he had never seen defendant holding or sniffing
16 or smelling any of T.'s underwear and Le did not tell T.'s older brother
17 that he had seen defendant doing any of those things. When she talked
18 with the D.A.'s investigator, Le denied walking into T.'s room or seeing
19 defendant sniff her underwear.

20 Le acknowledged that he did not want to be involved in the case and did
21 not want to go to court. Le knew that T.'s older brother had told police
22 that an unnamed friend might have seen something and Le understood
23 that T. was the person who gave his name to the police. Le
24 acknowledged that he did not ask his friend for the phone number of the
25 detective on the case so he could clear up any misinformation. The only
26 thing that Le told his friend was that he did not want to be involved.
27 After the D.A.'s investigator talked with Le, Le was upset with T.'s
28 older brother and called him and told him again that he did not want to
be involved. In phone conversations with the prosecutor, Le said that he
had never known T.'s older brother to lie. At trial, Le denied being
worried about what defendant might do, but admitted that he understood
from T.'s older brother that defendant had tried to set fire to their house.

Detective Tri Pham, a San Jose police officer, spoke with T. on December 4, 2008, at her high school. The interview was recorded and portions played for the jury.

Detective Pham wrote in his report that, as to the first incident, T. remembered that she woke up to rubbing against her buttocks over her pajamas and she could feel defendant's erect penis against her buttocks.

She did not say that his penis was exposed. She indicated to the officer that there had been skin-to-skin contact with her legs and waist. She pushed his hand away and went to her brother's room.

T. told Detective Pham that, during the second incident, she again awoke to defendant rubbing his penis against her buttocks. T. did not specially know if her breasts were rubbed on this second occasion. But she did know that defendant had touched her breasts at some point during the three incidents. She said defendant was smiling when he was rubbing her breasts.

T. informed Detective Pham that, during the third incident, she again awoke to defendant rubbing his penis against her buttocks. She did not mention anything about defendant rubbing her back on this occasion.

T. stated in regard to the touching, that defendant was "kind of making it look accidental." She told the detective that "defendant was kind of making it look not obvious."

T. also informed Detective Pham that she caught him several times looking through her window when she was changing or had just gotten out of the shower. The most recent peeping incident had occurred a few weeks before she had talked to her counselor. She also mentioned that there had been domestic violence in the past.

3. Rebuttal

In lieu of the prosecution presenting rebuttal evidence, the parties stipulated to the following: "Defense investigator Brent Cooper interviewed Kevin Le on June 12th, 2009. Mr. Cooper wrote in his report that Mr. Le said he entered [T.'s] bedroom for brief occasions but that he had never taken a nap in her bedroom."

(Cal. Ct. App. Opinion (“Op.”), pp. 2-11; Ans. Ex. E.)

Nguyen filed the instant action on February 7, 2012. As grounds for federal habeas relief, Nguyen claims that: (1) he was denied a fair trial when the trial court improperly coerced the jury; (2) his due process rights were violated when the trial court admitted evidence of Nguyen's prior domestic violence acts to bolster the complaint witness's credibility; (3) trial counsel rendered ineffective assistance; and (4) the cumulative errors were prejudicial.

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), this Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

“Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. A federal habeas court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was “objectively unreasonable.” *Id.* at 409.

This Court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and

1 convincing evidence. 28 U.S.C. § 2254(e)(1). It is error for a federal court to review *de*
2 *novo* a claim that was adjudicated on the merits in state court. *See Price v. Vincent*, 538
3 U.S. 634, 638-43 (2003) (reversing judgment of 6th Circuit granting habeas relief on *de*
4 *novo* review where claims did not meet standards for relief under § 2254(d)(1)). A state
5 court has “adjudicated” a petitioner’s constitutional claim “on the merits” for purposes of §
6 2254(d) when it has decided the petitioner’s right to post-conviction relief on the basis of
7 the substance of the constitutional claim advanced, rather than denying the claim on the
8 basis of a procedural or other rule precluding state court review on the merits. *Barker v.*
9 *Fleming*, 423 F.3d 1085, 1092 (9th Cir. 2005); *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th
10 Cir. 2004). A petitioner must present clear and convincing evidence to overcome the
11 presumption of correctness; conclusory assertions will not do. *Taylor v. Maddox*, 366 F.3d
12 992, 1000 (9th Cir. 2004).

13 DISCUSSION

14 I. Due Process – Jury Coercion

15 A. Facts

16 Nguyen first claims that the trial court erred when it asked for a count of votes when
17 it appeared that the jury was deadlocked, and that its subsequent instructions were “too
18 coercive and should not have been given.” (Pet. Attach. at 6.)

19 The California Court of Appeal summarized the facts with respect to this claim:

20 B. Jury Deadlock

21 Defendant asserts that, when the jury reported being deadlocked, the trial
22 court erred by inquiring into the number of votes for conviction and
23 acquittal. It then exacerbated the coercive effect of that improper inquiry
24 by its comments and supplemental instructions. He argues that the court
25 then compounded those errors by refusing to instruct as requested by his
26 defense counsel. He is not contending that the court gave the *Allen*-type
[FN3] of instruction forbidden in *People v. Gainer* (1977) 19 Cal.3d 835.
[FN4]

27 FN3. See *Allen v. U.S.* (1896) 164 U.S. 492, 501 [17 S.Ct. 154].

1 FN4. In *Gainer*, the California Supreme Court held, as judicially
2 declared rule of criminal procedure, that it was “error for a trial
3 court to give an instruction which either (1) encourages jurors to
4 consider the numerical division or preponderance of opinion of the
5 jury in forming or reexamining their views on the issues before
6 them; or (2) states or implies that if the jury fails to agree the case
7 will necessarily be retried.” (*People v. Gainer, supra*, 19 Cal.3d at
8 p. 852.)

9 *1. Background*

10 The record shows that, at approximately 3:30 p.m., on the first full day of
11 deliberations, the court received a communication from the foreperson that
12 indicated the jury was deadlocked. The foreperson had written that he was
13 not sure if the jurors could reach a verdict because they had “a majority, but
14 not a unanimous agreement.”

15 Out of the jury’s presence, the prosecution requested a *Moore* instruction.
16 (See *People v. Moore* (2002) 96 Cal.App.4th 1105.) Defense counsel
17 indicated that it was premature to give such instruction and he wished to
18 know the jury count.

19 The trial court brought the jury into the courtroom and inquired into the
20 deadlock. After learning that the jury’s deadlock was identical on all three
21 counts, the court asked the foreperson to indicate the vote “in terms of the
22 number for and the number against.” The foreperson replied, “Nine believe
23 guilty, three not guilty.” The foreperson explained that “some people view
24 a witness as more credible than others.” The court indicated that it could
give no further guidance on the issue of credibility and the jury had
“received all of the instructions on the evaluation of witnesses....” The
foreperson told the court that he definitely did not see the jurors making
any more progress that day or even perhaps the next day. The court
indicated that it would speak with the attorneys and stated: “Obviously, our
preference is and I’m sure your preference is too that if it’s humanly
possible to reach a verdict, then, of course, we want you to. But if you
can’t, you can’t. [¶] My thought is to ask you to come back tomorrow.
Because of the amount of time that’s left today, certainly I don’t want...
any rushing.”

25 While discussing when the jurors should return the next morning, the court
26 said, “But given the fact that... a holiday is coming up, you may want to
27 come in earlier. I mean, nine, is that all right?” The court and foreperson

1 agreed that the jurors would reconvene at 9 a.m. the following morning and
2 the court then indicated that the jurors were free to go for the evening.

3 After the jury was gone, defense counsel expressed surprise that the court
4 “asked which way the votes were” rather than asking for just the numerical
5 count. When the court questioned why defense counsel did not approach
6 when he heard the court’s inquiry, defense counsel explained that he did
7 not react in time.

8 The next day, the court stated that it had misunderstood defense counsel’s
9 request for a jury count. Defense counsel unsuccessfully moved for a
10 mistrial based on the disclosure that a majority favored conviction.
11 Counsel also voiced objections to the proposal to give a *Moore* instruction
12 to the jury to facilitate further deliberations.

13 One of defense counsel’s concerns with giving a supplemental *Moore*
14 instruction was that, given the revelation that the majority of jurors favored
15 conviction, the jurors might perceive the instruction as “telling the minority
16 to reconsider their position....” Defense counsel argued that the instruction
17 did not adequately explain that minority jurors have no greater duty than
18 majority jurors to reexamine their views, each juror was entitled to make
19 his or her own decision, and the jury was not required to reach a verdict.
20 The court indicated that it would instruct pursuant to *Moore* over counsel’s
21 objections.

22 Defense counsel then requested the court to additionally instruct that “each
23 juror is entitled to their [sic] own individual verdict and... a case does not
24 have to reach a verdict.” The court announced that it would read
25 CALCRIM Numbers 200 and 3550 in addition to the *Moore* instruction.
26 The court believed that the additional language was contained in those
27 standard instructions but, if defense counsel found some language was
missing from those instructions, the court would be “happy to consider it.”
It declined defendant’s request for a special instruction.

28 At about 9:44 a.m. that same day, the court reread CALCRIM Numbers
29 200 and 3550 and gave a supplemental *Moore* instruction to the jury.
30 Defense counsel again requested a mistrial because the instructions did not
31 indicate that the minority jurors had no greater duty than the majority jurors
32 to reexamine their views and did not mention the option of not reaching a
33 verdict. The court denied the request without prejudice.

34 Shortly after noon, the jury announced it had reached a verdict. The jury
35 found defendant guilty of all counts.

1 (Op. at 11-13.)
2

3 **B. Applicable Law**

4 “Any criminal defendant . . . being tried by a jury is entitled to the uncoerced
5 verdict of that body.” *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). Thus, an
6 instruction is unconstitutionally coercive if it denies the defendant the due process right to
7 a trial by a fair and impartial jury. *DeWeaver v. Runnels*, 556 F.3d 995, 1007 (9th Cir.
8 2009). The use of a supplemental jury charge given by the court to encourage a jury to
9 reach a verdict after the jury has been unable to agree for some period of deliberation has
10 long been sanctioned. *See Allen v. United States*, 164 U.S. 492, 501-02 (1896).

11 The Ninth Circuit has said that in a habeas case involving a state conviction the
12 questions for the court are (1) whether the applicable state court looked at the totality of
13 the circumstances in determining if the instruction was coercive; and (2) whether that
14 court’s determination on the coercion question was reasonable. *Parker v. Small*, 665 F.3d
15 1143, 1148 (9th Cir. 2011); *DeWeaver*, 556 F.3d at 1007 (state appellate court’s holding
16 that supplemental jury instruction containing a hypothetical mildly slanted in favor of the
17 prosecution was not coercive was not contrary to *Lowenfield*).
18

19 Federal courts reviewing an *Allen* charge given by a state court must consider the
20 supplemental instruction ““in its context and under all circumstances,”” *Lowenfield*, 484
21 U.S. at 237 (citation omitted); *Jiminez v. Myers*, 40 F.3d 976, 980 (9th Cir. 1993); *Locks v.*
22 *Sumner*, 703 F.2d 403, 406-07 (9th Cir. 1983). Whether the comments and conduct of the
23 state trial judge violated due process ultimately turns on whether ““the trial judge’s inquiry
24 would be likely to coerce certain jurors into relinquishing their views in favor of reaching a
25 unanimous decision.”” *Jiminez*, 40 F.3d at 979 (quoting *Locks*, 703 F.2d at 406). Relief
26 will not be granted “unless it is ‘clear from the record’ that an *Allen* charge had an
27 impermissibly coercive effect on the jury.” *Rodriguez v. Marshall*, 125 F.3d 739, 750 (9th
28 Cir. 1997).

1 Because an *Allen* charge carries the potential for jury coercion, the trial judge using
2 the charge should instruct jurors not to surrender their sincere convictions when they
3 reassess their positions. *See United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985);
4 *cf. Rodriguez*, 125 F.3d at 750 (no coercion where judge not only advised jurors not to
5 surrender their sincerely held beliefs but 1) made no comment on numerical split, 2) did
6 not know whether the majority favored conviction or acquittal, and 3) did not know the
7 identity of the holdouts; fact that the jury deliberated for four more days and called for a
8 reading of testimony indicated that there had been no coercion). This assures that the
9 “integrity of individual conscience in the jury deliberation process . . . not be
10 compromised.” *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981).

11 C. Analysis

12 The state appellate court agreed with Nguyen that the trial court acted improperly
13 when it asked the jury foreman to disclose the jury split “‘in terms of the number for and
14 against’ conviction” because the California Supreme Court had disapproved of anything
15 more than a neutral inquiry into numerical division due to the potential coercive effect:
16 “[t]he urging of agreement in such circumstances of course creates in the jury the
17 impression that the court, which has also heard the testimony in the case, agrees with the
18 majority of jurors. Coercion of the jurors in the minority clearly results.” (Op. at 14-15,
19 citing *People v. Carter* 68 Cal.2d 810, 815-816 (1968).) However, the court correctly
20 found that the error was merely of state law and not one of federal constitutional
21 magnitude. (*Id.* at 15, citing *Brasfield v. United States* 272 U.S. 448, 450 (1926);
22 *Lowenfield v. Phelps* 484 U.S. 231, 239-240 (1988) [decision in *Brasfield* was an exercise
23 of Supreme Court’s supervisory powers and was not predicated on due process or other
24 constitutional right].) Under the state supreme court precedent of *People v. Sheldon*, 48
25 Cal.3d 935, 959-960 (1989), the appellate court found that the next step was to consider
26 “whether the trial court’s comments and challenged supplemental instructions, which were
27 given to the deadlocked jurors to facilitate further deliberations, had an actual coercive

1 effect in light of the disclosure that nine jurors favored conviction on the three counts
2 charged.” (*Id.* at 16.)

3 After reviewing the record and the applicable state law, the appellate court
4 concluded that there was no coercive effect:

5 Defendant asserts that the court’s comments to the deadlocked jury were
6 coercive because they indicated that it wanted a verdict if humanly
7 possible, “preferably before the long weekend, which meant that the jurors
8 only had one more day to deliberate.” He maintains that the supplemental
9 instructions were specifically aimed at the minority jurors and placed
10 excessive pressure on them to acquiesce in the guilty verdicts.

11 In determining whether there is reasonable probability of jury agreement, a
12 court must exercise its power “without coercion of the jury, so as to avoid
13 displacing the jury’s independent judgment ‘in favor of considerations of
14 compromise and expediency.’ (*People v. Carter, supra*, 68 Cal.2d at p.
15 817....)” (*People v. Breaux* (1991) 1 Cal.4th 281, 319.) “[T]he question of
16 coercion is necessarily dependent on the facts and circumstances of each
17 case....” (*Ibid.*; see *People v. Carter, supra*, 68 Cal.2d at p. 816.) As
18 recognized in *Carter*, “reversible error may be found in excessive pressure
19 upon the jury ‘to reach a verdict, whatever its nature, rather than no verdict
20 at all.’” (*People v. Gainer* (1977) 19 Cal.3d 835, 851.)

21 In *People v. Moore, supra*, 96 Cal.App.4th 1105, an appellate court held
22 that the trial court did not err by giving a certain jury instruction when the
23 jury reported a deadlock. (*Id.* at p. 1108.) It found that “the challenged
24 instruction did not exert pressure on the jurors as a whole to reach a
25 verdict.” (*Id.* at p. 1108, 1118.) It pointed to the instructional language
26 telling the jury that the “‘goal as jurors should be to reach a fair and
27 impartial verdict *if you are able to do so* based solely on the evidence
28 presented and without regard to the consequences of your verdict [or]
29 regardless of how long it takes to do so.’ (Italics added.)” (*Id.* at p. 1121.)
30 It also noted that the jury was directed to “consider carefully, weigh and
31 evaluate all of the evidence presented at trial, to discuss their views, and to
32 consider the views of their fellow jurors” and instructed that “it was their
33 duty as jurors to deliberate with the goal of arriving at a verdict on the
34 charge ‘*if you can do so without violence to your individual judgment.*’
35 (Italics added.)” (*Ibid.*)

36 The appellate court in *Moore* concluded: “Contrary to defendant’s
37 argument on appeal, the jury was never directed that it was required to
38

1 reach a verdict, nor were any constraints placed on any individual juror's
2 responsibility to weigh and consider all the evidence presented at trial. The
3 trial court also made no remarks either urging a verdict be reached or
4 indicating possible reprisals for failure to reach an agreement. In short, it is
5 clear the trial court took great care in exercising its power 'without coercing
6 the jury into abdicating its independent judgment in favor of considerations
7 of compromise and expediency.... Nothing in the trial court's comment in
8 the present case properly may be construed as an attempt to pressure the
9 jury to reach a verdict....' (*People v. Proctor* (1992) 4 Cal.4th 499,
10 539....)" (*Ibid.*)

11 In *People v. Whaley* (2007) 152 Cal.App.4th 968, after learning that the
12 jurors were split 11 to one, the trial court "gave a supplemental instruction
13 taken from the decision in [Moore]." (*Id.* at p. 974.) On appeal, the
14 defendant argued that *Moore* had been wrongly decided and the trial court's
15 instructional suggestion to use role playing as a method of deliberation
16 "placed undue pressure" on the single holdout juror "to change his or her
17 opinion." (*Id.* at p. 982.) The majority of this court held that "the trial
18 court did not err in giving a supplemental instruction based on the
19 instruction approved in *Moore*" since the instruction did not violate the
20 *Gainer* rule that minority jurors cannot be instructed to rethink their
21 position in light of the majority's views or improperly encourage the
22 minority juror to acquiesce in the verdict without exercising his or her
23 independent judgment (see *People v. Gainer, supra*, 19 Cal.3d 835, 845,
24 848-849). (*People v. Whaley, supra*, 152 Cal.App.4th at pp. 981-984.)

25 Defendant urges us to take heed of Justice McAdam's concurring opinion
26 in *Whaley* in which the justice expressed his concerns about the potentially
27 coercive effect of the *Moore*-type instruction and "the need for utmost
caution." (*Id.* at p. 985 (conc. opn. of McAdams, J.)) Defendant suggests
that, unlike this case, the supplemental instruction in *Whaley* was not
coercive because the trial court did not inquire into whether the jury's
numerical division favored conviction, the jury did not reveal the reason for
its deadlock, and court did not express its preference that the jury reach a
verdict or encourage the jury do so within a limited timeframe. We do not
find these factors determinative.

28 Although the judge in this case expressed a preference that the jury reach a
29 verdict if "humanly possible" during the exchange with the jury foreperson,
30 the judge also expressly recognized that the jurors might not be able to
31 agree ("But if you can't, you can't"). The upcoming court holiday arose
32 during a discussion regarding when the jury should return the next morning
33 and the record does not show that the judge was pushing the jury to reach a
34

1 verdict before that time.

2 The trial court's supplemental instructions in this case included the
3 following language: "You should try to agree... on a verdict *if you can*.
4 *Each of you must decide the case for yourself*, but only after you have
5 discussed the evidence with the other jurors. [¶] Do not hesitate to change
6 your mind if you have been convinced that you were wrong. *But do not*
7 *change your mind just because other jurors disagree with you*. Keep an
8 open mind and openly exchange your thoughts and ideas about this case."
9 (Italics added.) The court told the jury: "It is not my role to tell you what
10 your verdict should be. *Do not take anything I said or did during the trial*
11 *as an indication of what I think about the facts, the witnesses, or what the*
12 *verdict should be.*" (Italics added.)

13 The court also instructed: "Your goal as jurors should be to reach a fair and
14 impartial verdict, *if you are able to do so*, based solely on the evidence
15 presented and without regard for the consequences of your verdict,
16 *regardless of how long it takes to do so....* [¶] In the course of your further
17 deliberations, you should not hesitate to reexamine your own views or to
18 request your fellow jurors to reexamine theirs. You should not hesitate to
19 change a view you once held if you are convinced it is wrong or to suggest
20 other jurors change their views if you are convinced that they are wrong....
21 [¶] It is your duty as jurors to deliberate with a goal of arriving at a verdict
22 on the charge *if you can do so without violence to your individual judgment*.
Both the People and the defendant are entitled to the *individual judgment of*
23 *each juror.*" (Italics added.)

24 The court suggested that the jurors experiment with different methods of
25 deliberation such as reverse role playing or changing discussion leaders.
26 But the court expressly cautioned: "By suggesting you should consider
27 changes in your method of deliberations, I want to stress that I am not
dictating or instructing you as to how to conduct your deliberations. I
merely find that you may find it productive to do whatever is necessary to
ensure each jury [sic] has a full and fair opportunity to express his or her
view and consider and understand the views of other jurors."

28 We conclude that the trial court made no coercive remarks that exerted
undue pressure on the minority jurors to change their votes or on the jury as
a whole to reach a verdict. As in *Moore* and *Whaley*, the supplemental
instructions in this case did not encourage the minority jurors to acquiesce
to the majority. As in *Whaley*, the court's suggestion regarding role-
playing applied equally to the minority and majority jurors and the jury was
under no compulsion to use that approach. (See *People v. Whaley, supra*,

1 152 Cal.App.4th at p. 983.) The supplemental instructions were
2 evenhanded, respected the integrity of the individual juror's judgments, and
3 did not target the minority jurors. They repeatedly emphasized the
4 importance of each juror's individual judgment. As in *Sheldon*, "the
5 potential for coercion was not realized by anything said or done by the
6 court...." (*People v. Sheldon, supra*, 48 Cal.3d at p. 960.) In light of the
7 supplemental instructions, it is not reasonably probable that a result more
8 favorable to defendant would have been reached in the absence of any
9 judicial inquiry into the number of jurors for and against conviction.

10 (Op. at 16-20.)

11 Here, the state appellate court's conclusion that there was no jury coercion was not
12 unreasonable. First, the comments by the trial court were neutral and did not indicate that
13 he was urging the minority to change their votes. Rather, he acknowledged that it was
14 possible the jury would not be able to reach a verdict and that he did not want them to rush
15 through deliberations: "if it's humanly possible to reach a verdict, then, of course, we want
16 you to. But if you can't, you can't... [¶] Because of the amount of time that's left today,
17 certainly I don't want... any rushing." *See supra* at 12. Accordingly, it is not likely that
18 the jury felt pressured to the point of coercion to reach a verdict by such statements.

19 Second, the supplemental instructions, which included the following statements,
20 were not likely to coerce the jurors "into relinquishing their views in favor of reach a
21 unanimous decision," *Jiminez*, 40 F.3d at 979: "[e]ach of you must decide the case for
22 yourself"; "[b]ut do not change your mind just because other jurors disagree with you";
23 "[d]o not take anything I said or did during the trial as an indication of what I think about
24 the facts, the witnesses, or what the verdict should be"; and "[i]t is your duty as jurors to
25 deliberate with a goal of arriving at a verdict on the charge if you can do so without
26 violence to your individual judgment." *See supra* at 18. The jurors were clearly instructed
27 not to surrender their sincere convictions such that the integrity of the individual
28 conscience in the jury deliberation process was not compromised. *See Bonam*, 772 F.2d at
1451; *Mason*, F.2d at 1268. The state court's determination that the instructions were
"evenhanded" and "respected the integrity of the individual juror's judgments," *see supra*

1 at 19, was reasonable. *Parker v. Small*, 665 F.3d at 1148. Because the challenged
2 instructions did not have an “impermissibly coercive effect on the jury,” Nguyen is not
3 entitled to habeas relief on this claim. *Marshall*, 125 F.3d at 750.

4 **II. Evidence of Prior Domestic Violence**

5 **A. Facts**

6 Nguyen claims that the trial court abused its discretion in admitting evidence of his
7 prior domestic violence and thereby violated his right to due process. (Pet. Attach. at 18.)

8 The state appellate court summarized the facts regarding this claim:

9 The prosecutor sought a pretrial ruling that evidence of defendant’s prior
10 threats and acts of violence against T. and her family was admissible in the
11 prosecution’s case in chief on grounds the evidence was relevant to T.’s
12 state of mind in belatedly reporting defendant’s conduct and to the mother’s
13 state of mind when she failed to act upon learning what had happened from
14 her daughter. At the hearing on the motion, the prosecutor indicated that
15 six or seven prior incidents were relevant, including defendant’s act of
16 setting the house on fire, his act of going after T.’s mother with an axe,
17 which resulted in a felony conviction, his act of domestic violence against
18 T.’s mother, which resulted in a misdemeanor conviction, misdemeanor
19 violations of a restraining order, and assaults with a knife against T. and her
20 brother. Defense counsel argued that the evidence was inadmissible
21 propensity evidence under Evidence Code section 1101 and, in any case,
22 should be excluded under Evidence Code section 352 as prejudicial. He
23 also complained that admission of the evidence would require “seven mini
24 trials within this trial.” The trial court ruled that evidence of one violation
25 of the protective order and evidence of the axe attack and a knife attack
26 would be admissible. It made clear that the section 352 issue could be
27 revisited at trial.

28 At trial, without objection, T. testified that fear of defendant delayed her
29 reporting of the June 2007 incidents and briefly described prior acts of
30 threats of violence by defendant that she had witnessed or learned about
31 from her mother. Upon defense counsel’s request, the court instructed the
32 jury: “You are to only use the prior domestic violence acts and convictions
33 to determine [T.’s] credibility in saying that she is afraid. Defendant’s prior
34 domestic violence acts and convictions must not be used as character
35 evidence to determine whether the defendant committed the charged
36 crimes.” Before the parties’ stipulation concerning defendant’s prior

1 convictions was read to the jury, defense counsel clarified that he was
2 preserving his prior evidentiary objections. After the stipulation was read
3 to the jury, the court admonished the jury: “You are only to use the prior
4 domestic violence acts and convictions to determine [T.’s] credibility in
5 saying that she is afraid. Defendant’s prior domestic violence acts and
6 convictions must not be used as character evidence to determine whether
7 the defendant committed the charged crimes.”

8 (Op. at 20-21.)

9 **B. Applicable Law**

10 The admission of evidence is not subject to federal habeas review unless a specific
11 constitutional guarantee is violated or the error is of such magnitude that the result is a
12 denial of the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197
13 F.3d 1021, 1031 (9th Cir. 1999); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir.), *cert.*
14 *denied*, 479 U.S. 839 (1986). The Supreme Court “has not yet made a clear ruling that
15 admission of irrelevant or overtly prejudicial evidence constitutes a due process violation
16 sufficient to warrant issuance of the writ.” *Holley v. Yarborough*, 568 F.3d 1091, 1101
17 (9th Cir. 2009) (finding that trial court’s admission of irrelevant pornographic materials
18 was “fundamentally unfair” under Ninth Circuit precedent but not contrary to, or an
19 unreasonable application of, clearly established Federal law under § 2254(d)).

20 Failure to comply with state rules of evidence is neither a necessary nor a sufficient
21 basis for granting federal habeas relief on due process grounds. *See Henry*, 197 F.3d at
22 1031; *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). While adherence to
23 state evidentiary rules suggests that the trial was conducted in a procedurally fair manner,
24 it is certainly possible to have a fair trial even when state standards are violated;
25 conversely, state procedural and evidentiary rules may countenance processes that do not
26 comport with fundamental fairness. *See id.* (citing *Perry v. Rushen*, 713 F.2d 1447, 1453
27 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984)). The due process inquiry in federal
28 habeas review is whether the admission of evidence was arbitrary or so prejudicial that it
 rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir.

1 1995); *Colley*, 784 F.2d at 990. But note that only if there are no permissible inferences
2 that the jury may draw from the evidence can its admission violate due process. *See*
3 *Jammal*, 926 F.2d at 920.

4 **C. Analysis**

5 The California Court of Appeal rejected this claim on the merits:

6 Defendant now contends that the trial court abused its discretion under
7 Evidence section 352 in admitting evidence of his prior domestic violence
8 acts and convictions and, thereby, violated his due process rights under the
9 Fourteenth Amendment to the United States Constitution.

10 “A trial court has broad discretion under Evidence Code section 352 to
11 ‘exclude evidence if its probative value is substantially outweighed by the
12 probability that its admission will (a) necessitate undue consumption of
13 time or (b) create substantial danger of undue prejudice, of confusing the
14 issues, or of misleading the jury.’” (*People v. Milles* (2010) 48 Cal.4th 158,
15 195.) “A trial court’s exercise of discretion in admitting or rejecting
16 evidence pursuant to Evidence Code section 352 ‘will not be disturbed on
17 appeal unless there is a manifest abuse of that discretion resulting in a
18 miscarriage of justice.’ [Citation.]” (*People v. Cain* (1995) 10 Cal.4th 1,
19 33.)

20 Evidence of defendant’s violent acts or threats of violence that T. had
21 witnessed or of which she had knowledge had a tendency in reason to
22 establish that she genuinely feared defendant, which in turn had a tendency
23 in reason to explain her delayed reporting to someone outside the family
24 and was clearly relevant to her credibility. (See Evid. Code, §§ 210, 780;
25 Cal. Law Revision Com. Com., 29 B, Pt. 2 West’s Ann. Evid. Code (1995
26 ed.) foll. § 780, p. 586; see also § 351.) The stipulation regarding
27 defendant’s convictions lent credibility to T.’s testimony that such acts had
28 occurred and had made her afraid. The trier of fact “may consider in
determining the credibility of a witness any matter that has any tendency in
reason to prove or disprove the truthfulness of his testimony at the hearing,
including” the “existence or nonexistence of any fact testified to by him.”
(Evid. Code, § 780, subd. (i).)

29 Although defendant now attempts to minimize the probative value of
30 evidence of defendant’s acts or threats of violence, such evidence was
31 highly relevant with respect to T.’s credibility, a key issue at trial, since the
32 delay in reporting to anyone outside her family could be a basis for
33

1 attacking her credibility in claiming that defendant had sexually molested
2 her. Defendant also argues that using such evidence to show the state of
3 mind of T.'s mother was "highly speculative" because the mother did not
4 testify. While T.'s mother did not ultimately testify at trial, this eventuality
5 does not affect the propriety of the pretrial ruling based upon the
6 prosecution's proffered theories of relevancy. The evidence of defendant's
7 prior acts or threats of violence was eventually admitted at trial for the
8 limited purpose of assessing T.'s credibility in saying that she was afraid.

9
10 Citing *People v. Brown* (1993) 17 Cal.App.4th 1389, defendant maintains
11 that other-crimes evidence is not admissible to bolster witness's credibility
12 because the evidence is more prejudicial than probative. In *Brown*, the
13 defendant was charged with molestation (§ 288, subd. (a)) and the trial
14 court admitted testimony regarding prior uncharged crimes of molestation
15 to reinforce the credibility of the detectives who had interviewed defendant
16 Brown and who had testified that the defendant admitted molesting his
17 daughter and previously molesting his niece and at least one of his sisters.
(*Id.* at p. 1394.) The appellate court found that, in that case, the other-
18 crimes evidence led "only to an inference Brown had a propensity to molest
19 young girls." (*Id.* at p. 1396.)

20 This case is distinguishable from *Brown*. The other-crimes evidence in
21 *Brown* was not relevant to a victim's state of mind and her conduct
22 consistent with that state of mind. Here, the chain of reasoning establishing
23 the relevancy does not rely on any impermissible inference of propensity or
24 character. In addition, unlike *Brown*, the other crimes were not the same or
25 substantially similar to the crimes being tried.

26 Defendant maintains that the evidence ruled admissible was "highly
27 prejudicial." For purposes of Evidence Code section 352, "'prejudicial' is
28 not synonymous with 'damaging' but refers instead to evidence that
"uniquely tends to evoke an emotional bias against defendant" without
regard to its relevance on material issues. (*People v. Bolin* (1998) 18
Cal.4th 297, 320...; see also *People v. Edelbacher* (1989) 47 Cal.3d 983,
1016....") (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) "In applying
this statute we evaluate the 'risk of "undue" prejudice, that is, "'evidence
which uniquely tends to evoke an emotional bias against the defendant as
an individual and which has very little effect on the issues,'" not the
prejudice "that naturally flows from relevant, highly probative evidence.'" [Citations.]" (*People v. Salcido* (2008) 44 Cal.4th 93, 148.)

29 Defendant contends that evidence of his prior acts of domestic violence
30 evoked an emotional bias against him and the jury was likely to misuse the
31

1 evidence to conclude that he was an individual of bad character. We
2 conclude that the trial court acted within its discretion in concluding such
3 potential undue prejudice did not outweigh the probative value of that
4 evidence. Furthermore, the court adequately addressed any potential undue
5 prejudice through appropriate limiting instructions. [FN7] “The
6 presumption is that limiting instructions are followed by the jury. (See,
7 e.g., *People v. Anderson* (1987) 43 Cal.3d 1104, 1120....)” (*People v.*
8 *Waidla* (2000) 22 Cal.4th 690, 725.)

9
10 FN7. In addition to giving limiting instructions during trial, the trial
11 court’s main charge before submission to the jury included the
12 following instruction regarding evidence of defendant’s prior acts
13 not charged in this case: “ Do not [] consider the evidence for any
14 other purpose except for the limited purpose of evaluating the
15 believability of [T.’s] fear of the defendant. ¶ Do not conclude
16 from this evidence that the defendant has a bad character or is
17 disposed to commit crime. ¶ The People must still prove each
18 charge beyond a reasonable doubt.

19 Defendant also argues that its admission necessitated undue consumption of
20 time and was cumulative since an expert testified regarding delayed
21 reporting by child victims. The trial court limited the number of admissible
22 incidents in its pretrial ruling. In addition, the evidence of defendant’s acts
23 and threats of violence toward T. and her family was not duplicative of the
CSAAS evidence regarding delayed reporting by child victims. The former
was relevant to T.’s actions and credibility in particular while the latter
applied to only child victims in general.

24 Applying the deferential abuse of discretion standard, we conclude that the
25 trial court’s pretrial ruling was not an abuse of discretion. Since defendant
26 interposed no due process objection below, his constitutional claim is
27 cognizable on appeal only insofar as he is arguing that any error in making
the evidentiary ruling had the additional legal consequence of depriving
him of due process. (*People v. Partida* (2005) 37 Cal.4th 428, 435-436; see
Evid. Code, § 353.) Our rejection of the evidentiary claim also disposes of
the due process claim. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn.
17; *People v. Cain, supra*, 10 Cal.4th at p. 33.)

28 (Op. at 21-25.)

29 Nguyen’s claim is without merit. As stated above, *see supra* at 22, the admission of
30 challenged evidence violates due process only if there are no permissible inferences that
31

1 the jury may draw from it. *See Jammal*, 926 F.2d at 920. The state appellate court was not
2 unreasonable in finding that the prior domestic violence evidence was relevant and
3 probative of T.'s credibility: “[e]vidence of defendant's violent acts or threats of violence
4 that T. had witnessed or of which she had knowledge had a tendency in reason to establish
5 that she genuinely feared defendant, which in turn had a tendency in reason to explain her
6 delayed reporting to someone outside the family and was clearly relevant to her
7 credibility.” *See supra* at 22. Even though the evidence could indicate propensity, the trial
8 court gave limiting instructions that specifically charged the jury not to conclude from the
9 evidence that Nguyen “has a bad character or is disposed to commit crime,” *see supra* at
10 24: “Do not consider the evidence for any other purpose except for the limited purpose of
11 evaluating the believability of [T.'s] fear of the defendant.” *Id.*

12 The permissible inferences and the cautionary instructions support the conclusion
13 that there was no due process violation. *See, e.g., Houston v. Roe*, 177 F.3d 901, 910 n.6
14 (9th Cir. 1999) (admission of similar prior bad acts to show motive and intent, coupled
15 with limiting instructions, was appropriate); *Terrovona v. Kincheloe*, 912 F.2d 1176, 1180-
16 81 (9th Cir. 1990) (admission of prior bad act testimony did not violate due process where
17 trial court balanced probative weight against prejudicial effect and gave jury cautionary
18 instruction), *cert. denied*, 499 U.S. 979 (1991); *Gordon v. Duran*, 895 F.2d 610, 613 (9th
19 Cir. 1990) (admission of uncharged crimes did not violate due process where trial court
20 gave limiting instruction to jury, jury was able to weigh witness' credibility and evidence
21 was relevant to defendant's intent); *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985)
22 (admission of uncharged offenses does not violate constitutional rights where jury had
23 opportunity to weigh credibility of complaining witness and judge admonished jury to
24 consider incident only as evidence of intent, not as evidence of bad character). The
25 admission of Nguyen's prior domestic violence was not arbitrary or so prejudicial that it
26 rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d at 1357. Accordingly,
27 it cannot be said that the state court's rejection of this claim was contrary to, or involved an
28

1 unreasonable application of, clearly established Supreme Court precedent. *See* 28 U.S.C. §
2 2254(d). Nguyen is not entitled to habeas relief on this claim.

3 **III. *Ineffective Assistance of Counsel***

4 **A. *Claims***

5 Nguyen claims that he was deprived of his Sixth Amendment right to effective
6 assistance by his trial counsel's failure to object to the following: (1) admission of profile
7 evidence; (2) the prosecutor exploiting the profile evidence in his closing argument; and
8 (3) the prosecutor's misconduct in appealing to the passion and prejudice of the jurors
9 during closing argument. (Pet. Attach. at 24, 29.)

10 **B. *Applicable Law***

11 In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, Nguyen
12 must establish two things. First, he must establish that counsel's performance was
13 deficient, *i.e.*, that it fell below an "objective standard of reasonableness" under prevailing
14 professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, he
15 must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there
16 is a reasonable probability that, but for counsel's unprofessional errors, the result of the
17 proceeding would have been different." *Id.* at 694. A reasonable probability is a
18 probability sufficient to undermine confidence in the outcome. *Id.* A court need not
19 determine whether counsel's performance was deficient if the lack of prejudice is clear.
20 *Id.* at 697.

21 The *Strickland* framework for analyzing ineffective assistance of counsel claims is
22 considered to be "clearly established Federal law, as determined by the Supreme Court of
23 the United States" for the purposes of 28 U.S.C. § 2254(d) analysis. *See Cullen v.*
24 *Pinholster*, 131 S. Ct. 1388, 1403 (2011). On federal habeas, a petitioner must show that
25 the state court applied *Strickland* to the facts of his case in an objectively unreasonable
26 manner. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam). A "doubly" deferential
27 judicial review is appropriate in analyzing ineffective assistance of counsel claims under §
28

1 2254. *See Pinholster*, 131 S. Ct. at 1410-11; *Harrington v. Richter*, 131 S. Ct. 770, 788
2 (2011) (same); *Premo v. Moore*, 131 S. Ct. 733, 740 (2011) (same). The general rule of
3 *Strickland*, *i.e.*, to review a defense counsel’s effectiveness with great deference, gives the
4 state courts greater leeway in reasonably applying that rule, which in turn “translates to a
5 narrower range of decisions that are objectively unreasonable under AEDPA.” *Cheney v.*
6 *Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (citing *Yarborough v. Alvarado*, 541 U.S.
7 652, 664 (2004)). When § 2254(d) applies, “the question is not whether counsel’s actions
8 were reasonable. The question is whether there is any reasonable argument that counsel
9 satisfied *Strickland*’s deferential standard.” *Harrington*, 131 S. Ct. at 788.

10 **C. Analysis**

11 **1. Failure to Object to the Admission of Profile Evidence**

12 The state appellate court found that counsel did not render ineffective assistance by
13 failing to object to the admission of the alleged profile evidence.

14 “In assessing claims of ineffective assistance of trial counsel, we consider
15 whether counsel’s representation fell below an objective standard of
16 reasonableness under prevailing professional norms and whether the
17 defendant suffered prejudice to a reasonable probability, that is, a
18 probability sufficient to undermine confidence in the outcome. (*Strickland*
19 *v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d
20 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217....) A reviewing court
21 will indulge in a presumption that counsel’s performance fell within the
22 wide range of professional competence and that counsel’s actions and
23 inactions can be explained as a matter of sound trial strategy. Defendant
24 thus bears the burden of establishing constitutionally inadequate assistance
25 of counsel. (*Strickland v. Washington*, *supra*, at p. 687 [104 S.Ct. at p.
26 2064]; *In re Andrews* (2002) 28 Cal.4th 1234, 1253....) If the record on
27 appeal sheds no light on why counsel acted or failed to act in the manner
28 challenged, an appellate claim of ineffective assistance of counsel must be
rejected unless counsel was asked for an explanation and failed to provide
one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266....) Otherwise, the claim is
more appropriately raised in a petition for writ of habeas corpus. (*Id.* at pp.
266-267.)” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

1 1. “*Grooming*” Evidence2 Lewis’s testimony on the grooming of child sexual abuse victims was
3 adduced with regard to CSAAS and its element of secrecy. Defendant
4 contends, without any citation to authority, that the testimony was
5 objectionable on the grounds it was profile evidence and outside the scope
6 of proper CSAAS evidence.7 “Profile evidence” is “not a separate ground for excluding evidence; such
8 evidence is inadmissible only if it is either irrelevant, lacks foundation, or
9 is more prejudicial than probative. [Citation.]” (*People v. Smith* (2005) 35
10 Cal.4th 334, 357.) CSAAS evidence is admissible if a credibility issue
11 arises due to a victim’s delayed reporting, as occurred here. (See *People v.*
12 *Perez* (2010) 182 Cal.App.4th 231; *People v. Sandoval* (2008) 164
13 Cal.App.4th 994, 1001; *People v. Patino* (1994) 26 Cal.App.4th 1737,
14 1745; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301; *People v.*
15 *Bowker* (1988) 203 Cal.App.3d 385, 394.) “CSAAS testimony has been
16 held admissible for the limited purpose of disabusing a jury of
17 misconceptions it might hold about how a child reacts to a molestation.
18 (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301...; *People v.*
19 *Bowker*, *supra*, 203 Cal.App.3d at p. 391....)” (*People v. Patino*, *supra*, 26
20 Cal.App.4th at p. 1744.) Where appropriate, CSAAS may be admitted as
21 part of the prosecution’s case-in-chief. (See *id.* at p. 1745.)22 In this case, both the trial court’s instructions and the testifying expert’s
23 testimony made clear to the jury that the CSAAS evidence was being
24 admitted only for the limited purpose of evaluating T.’s credibility based on
25 her conduct and it could not be used for the purpose of deciding whether
26 defendant committed the charged crimes in particular. Defendant has not
27 demonstrated that defense counsel was remiss in failing to object to the
28 “grooming” evidence on the ground it was improper profile evidence or
 outside the scope of proper CSAAS testimony. “Where ‘there was no
 sound legal basis for objection, counsel’s failure to object to the admission
 of the evidence cannot establish ineffective assistance.’ (*People v. Cudjo*
 (1993) 6 Cal.4th 585, 616, 25 Cal.Rptr.2d 390, 863 P.2d 635.)” (*People v.*
 Ghent (1987) 43 Cal.3d 739, 772.)

29 (Op. at 25-27.)

30 Applying the “doubly” deferential standard of review to this claim under § 2254,
31 this Court cannot conclude that the state court unreasonably applied *Strickland* in rejecting
32 this claim. First of all, Nguyen has failed to show that counsel’s performance was
33 ineffective.

1 deficient. As discussed by the state court above, the CSAAS was admitted for the limited
2 purpose of evaluating T.'s credibility, *i.e.*, to explain T.'s description of Nguyen's touching
3 as "accidental" or "not obvious" as presented by the defense. *See supra* at 9. Because
4 there were permissible inferences to be drawn from it, the admission of the CSAAS
5 evidence with respect to "grooming" was lawful. *See Jammal*, 926 F.2d at 920. Because
6 Nguyen fails to show that the admission of the evidence was improper, he cannot show
7 that counsel behaved unreasonably by failing to object to it. Furthermore, it is not
8 reasonably probable that Nguyen was prejudiced by the counsel's failure to object because
9 the trial court and the expert testimony made it clear to the jury that the evidence was not
10 to be used for the purpose of deciding whether Nguyen actually committed the charged
11 crimes. (Op. at 26, 28-29.) Accordingly, he is not entitled to habeas relief based on this
12 claim.

13 **2. *Failure to Object to Prosecutor's Exploitation of Profile***
14 ***Evidence***

15 The state appellate court also rejected the claim that counsel rendered ineffective
16 assistance by failing to object to the prosecutor's "exploitation" of the profile evidence.

17 During closing argument, the prosecutor intimated that the jury should
18 believe the victim since she had opportunities to exaggerate defendant's
19 misconduct but she did not. He suggested that she instead had
20 acknowledged limited wrongdoing by defendant. The prosecutor then
21 asked the rhetorical question how does telling Officer Pham that defendant
22 was "kind of trying" to make the touching look accidental help the victim
23 since her statement introduces the idea that maybe the touching was
24 accidental. He next argued: "How does it help her? It doesn't help her.
25 What it does do is it makes it chillingly real. This is grooming. Remember
26 I asked Carl Lewis, what is grooming? Grooming is when you
27 progressively try to make the child more and more comfortable with what's
28 going on. You start out small, and you progressively get more and more
serious. [¶] It's like the guy in the crowded bus or the crowded elevator.
It's accidental. We're packed in like sardines. He has an alibi. He has a
built-in alibi. He's easing into it. It makes it chillingly real, but it doesn't
help somebody who is trying to frame someone with lies."

1 We do not agree with the A.G. that the prosecutor's argument was
2 permissible because it merely urged the jury to not disbelieve the victim
3 because defendant's touching was not inconsistent with the behavior of a
4 child molester. The CSAAS evidence was admitted for the purpose of
5 helping the jurors evaluate the victim's credibility based on *her conduct*,
6 not to assess the defendant's culpability based on his conduct. CSAAS
7 evidence is "admissible *solely* for the purpose of showing that the victim's
8 reactions as demonstrated by the evidence are not inconsistent with having
9 been molested." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394.)

10 It is clear that the prosecutor improperly strayed, however briefly, into
11 arguing that the touching constituted grooming behavior by him, which
12 supported a finding that defendant committed the charged crimes. That
13 argument violated the trial court's instructions regarding the limited use of
14 the admitted CSAAS evidence and contravened established case law that
15 CSAAS testimony is inadmissible for the purpose of proving a particular
16 defendant actually molested an alleged victim. (See *People v. Wells* (2004)
17 118 Cal.App.4th 179, 188; *People v. Patino*, *supra*, 26 Cal.App.4th at p.
18 1744.)

19 Nevertheless, the claim of ineffective assistance based on defense counsel's
20 failure to object to this argument must be rejected. ("[A] mere failure to
21 object to... argument seldom establishes counsel's incompetence.
22 [Citations.]" (*People v. Ghent*, *supra*, 43 Cal.3d at p. 772.) "[C]ompetent
23 counsel may often choose to forgo even a valid objection." (*People v. Riel*
24 (2000) 22 Cal.4th 1153, 1197.) In this case, defense counsel may have
25 made the reasonable tactical decision that the court's instructions were
26 adequate to address the problem and did not require further admonition of
27 the jury and he would deal with the prosecutor's improper statements in his
closing argument. (See *People v. Welch* (1999) 20 Cal.4th 701, 764
[legitimate tactical decision to not interrupt prosecutor's argument to object
to misconduct and to respond in argument]; cf. *People v. Martinez* (2010)
47 Cal.4th 911, 957 [although no objection to prosecutor's allegedly
improper argument, defense counsel effectively responded in closing
argument].)

28 Before Lewis testified, the trial court gave the following instruction: "You
will hear testimony from an expert regarding Child Sexual Abuse
Accommodation Syndrome. Testimony about Child Sexual Abuse
Accommodation Syndrome is not evidence that the defendant committed
any of the crimes charged against him. You may consider this evidence
only in deciding whether or not the alleged victim's conduct was not
inconsistent with conduct of someone who has been molested in evaluating

1 the believability of her testimony.” (Italics added.)

2 Prior to closing argument, the court gave its full instructions to the jury.
3 The court told the jury: “During trial, certain evidence was admitted for a
4 limited purpose. You may consider that evidence only for that purpose and
5 for no other.” That charge also included the following instruction: “You
6 have heard testimony from Carl Lewis regarding Child Sexual Abuse
7 Accommodation Syndrome. Carl Lewis’ testimony about Child Sexual
8 Abuse Accommodation Syndrome is not evidence that the defendant
9 committed any of the crimes charged against him. You may consider this
10 evidence only in deciding whether or not [T.’s] conduct was not
11 inconsistent with the conduct of someone who had been molested in
12 evaluating the believability of her testimony.” (See CALCRIM No. 1193.)
13 The court directed the jury to follow the law as explained regardless of the
14 attorney’s comments. It also stated: “Nothing that the attorneys say is
15 evidence. In their opening statements and closing arguments, the attorneys
16 discuss the case, but their remarks are not evidence.”

17 In closing argument, defense counsel reminded jurors about the limited
18 purpose of the CSAAS evidence and the court’s instruction and indicated
19 that the prosecutor was advocating misuse of that evidence. He argued:
20 “Now what happens when the accuser, [T.], has been proven to be
21 inconsistent, to be fabricating? You call in your expert and you try to
22 rehabilitate. And you try to say, look, you know these are some symptoms
23 that are consistent with this syndrome, a person who may be suffering from
24 this syndrome. Very important, ladies and gentlemen. What Carl Lewis
25 testified to cannot prove whether there was sexual abuse or not. The only
26 purpose of that testimony – I’m going to call it the syndrome for short – is
27 to help you understand these behaviors; okay? And his honor has provided
you CALCRIM 1193 to help you understand that. [¶] Mr. Lewis also
admitted on the stand that law enforcement and prosecutors have misused
the syndrome in the legal arena.... Here, [the prosecutor] is asking you,
look past these inconsistencies, look past these fabrications, because it falls
within this syndrome. [¶] We also know the syndrome does not factor in
fabrication. It does talk about delayed, conflicting, unconvincing
disclosure, but those are also indicators of fabrication.”

28 “We presume that jurors comprehend and accept the court’s directions.
(E.g., *People v. Bonin* (1988) 46 Cal.3d 659, 699....) We can, of course, do
nothing else. The crucial assumption underlying our constitutional system
of trial is that jurors generally understand and faithfully follow instructions.
(*Francis v. Franklin*, *supra*, 471 U.S. at p. 325, fn. 9, 105 S.Ct. at p. 1976,
fn. 9.)” (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Defendant

1 has not established that his counsel acted incompetently or there is a
2 reasonable probability that the result of his trial would have been different
3 had defense counsel objected to the prosecutor's "grooming" remarks. (See
Strickland v. Washington, supra, 466 U.S. 668, 694.)
4 (Op. at 27-30.)

5 Assuming that counsel's failure to object was unreasonable, this claim fails because
6 Nguyen was not prejudiced by counsel's deficient performance. The record shows that the
7 trial court's instructions and counsel's own closing remarks sufficiently inoculated Nguyen
8 from any prejudicial effect of the prosecutor's improper remarks. *See Weygandt v.*
9 *Ducharme*, 774 F.2d 1491 (9th Cir. 1985) (failure to object to prosecutor's improper
10 closing remarks falls short of constitutional prejudice when considered within "totality of
11 the evidence").

12 The trial court instructed the jury before the expert's testimony that CSAAS "is not
13 evidence that the defendant committed any of the crimes charged against him" and that it
14 was to be considered "only in deciding whether or not the alleged victim's conduct was not
15 inconsistent with conduct of someone who has been molested in evaluating the
16 believability of her testimony." *See supra* at 30-31. Furthermore, in its full instructions to
17 the jury before closing argument, the trial court reminded jurors that evidence which was
18 admitted for a limited purpose was to be considered "only for that purpose and for no
19 other." *Id.* at 31. The trial court repeated its earlier instruction that expert testimony
20 regarding CSAAS was "not evidence that the defendant committed any of the crimes
21 charged against him" and that it was to be considered "only in deciding whether or not
22 [T.'s] conduct was not inconsistent with the conduct of someone who had been molested in
23 evaluating the believability of her testimony." *Id.* The trial court also stated that
24 "[n]othing that the attorneys say is evidence" and their remarks during opening statements
25 and closing arguments "are not evidence." *Id.* The jury is presumed to have followed the
26 trial court's instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Then
27 during his own closing argument, trial counsel reminded the jury that the CSAAS evidence
28

1 was to be used for a limited purpose and that the trial court had provided them with
2 instructions to that effect: “What Carl Lewis testified to cannot prove whether there was
3 sexual abuse or not. The only purpose of that testimony – I’m going to call it the
4 syndrome for short – is to help you understand these behaviors; okay? And his honor has
5 provided you CALCRIM 1193 to help you understand that.” *See supra* at 31. Within the
6 totality of the evidence, it cannot be said that “there is a reasonable probability that, but for
7 counsel’s unprofessional errors, the result of the proceeding would have been different.”
8 *Strickland*, 466 U.S. at 694. Nguyen is not entitled to habeas relief on this claim.

9

10 **3. *Failure to Object to Prosecutor’s Remarks Appealing to Jury’s***
Passion and Prejudice

11 Lastly, the state appellate court found Nguyen was not prejudiced by the
12 prosecutor’s remarks appealing to the jury’s passion and prejudice.

13 At the end of the prosecutor’s rebuttal argument, he stated: “What I’d leave
14 you with is this. Look, the law says her word can prove a case beyond a
15 reasonable doubt. The law says if she gets up here and tells the truth, her
16 word can move mountains. And that means something not only for the law,
17 but it means something for her as well. I don’t know what this girl’s
prospects are. But assuming you did justice in this case, what she will
remember is that when she got up here and told the truth, the system
worked for her. She will carry that away for sure.”

18 Defendant maintains that these remarks were an improper appeal to the
19 passion and prejudice of the jurors and defense counsel should have
20 objected. He contends that the prosecutor was suggesting that, “if the jury
21 did not convict, T. would lose all faith in the justice system and would have
a miserable life....”

22 “It has long been settled that appeals to the sympathy or passions of the jury
23 are inappropriate at the guilt phase of a criminal trial. [Citations.]” (*People*
24 v. *Fields* (1983) 35 Cal.3d 329, 362.) “A prosecutor is allowed to make
25 vigorous arguments..., as long as these arguments are not inflammatory
26 and principally aimed at arousing the passion or prejudice of the jury.
(*People v. Fields, supra*, 35 Cal.3d 329, 362-363...; *People v. Fosselman*
27 (1983) 33 Cal.3d 572, 581-581....)” (*People v. Pensinger* (1991) 52 Cal.3d
1210, 1251.)

1 Even assuming that the closing remarks constituted prosecutorial
2 misconduct, they were brief and relatively mild. (Cf. *People v. Fields*,
3 *supra*, 35 Cal.3d at p. 362 [prosecutor's argument graphically describing
4 the crime from the murder victim's perspective invited jurors to "depart
5 from their duty to view the evidence objectively" and was an improper
6 appeal for victim sympathy].) Further, a decision whether to object to
7 instances of prosecutorial misconduct is "inherently tactical" and "the
8 failure to object will rarely establish ineffective assistance. [Citations.]"
(*People v. Maury* (2003) 30 Cal.4th 342, 419.)

9
10 Before argument, the trial court instructed the jurors to "not let sympathy,
11 bias, prejudice, or public opinion influence your decision." The court
12 directed them to "Decide what the facts are in this case" based on only the
13 evidence and made clear that "[n]othing that the attorneys say is evidence."
14 Defense counsel may have made the reasonable tactical choice to not call
15 attention to the prosecutor's remarks, especially since the jurors had been
16 instructed to reach a decision based only on the evidence and to not be
17 influenced by sympathy, bias, or prejudice. (See *People v. Ghent*, *supra*,
18 43 Cal.3d at p. 773 ["Counsel may well have tactically assumed that an
19 objection or request for admonition would simply draw closer attention to
20 the prosecutor's isolated comments"].) In addition, defense counsel may
21 have reasoned that it was unnecessary to object since the prosecutor's plea
22 was expressly conditioned upon the victim telling the truth and the defense
23 counsel was arguing that the victim was not telling the truth as reflected by
24 her inconsistent statements and delayed reporting.

25 Further, we presume the jury followed the court's instruction. (See *People*
26 *v. Martinez*, *supra*, 47 Cal.4th at p. 957.) We find no reasonable
27 probability that the result of the proceeding would have been more
favorable to defendant if his counsel had objected to the prosecutor's
remarks. Defendant failed to establish his claim of ineffective assistance of
counsel.

28 (Op. at 30-32.)

29 This claim also fails for the same reasons discussed in rejecting Nguyen's second
30 ineffective assistance claim, *see supra* at 32, – the trial court's instructions to the jury as
31 discussed by the state appellate court above were sufficient to protect Nguyen from any
32 prejudicial effect of the prosecutor's inappropriate comments. When such a curative
33 instruction is issued, a court presumes that the jury has disregarded inadmissible evidence

1 and that no due process violation occurred. *See Greer v. Miller*, 483 U.S. 756, 766 n.8
2 (1987); *Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (the Court condemned egregious,
3 inflammatory comments by the prosecutor but held that the trial was fair since curative
4 actions were taken by the trial judge); *Tan v. Runnels*, 413 F.3d 1101, 1115 (9th Cir. 2005)
5 (“we presume jurors follow the court’s instructions absent extraordinary circumstances”).
6 This presumption may be overcome if there is an “overwhelming probability” that the jury
7 would be unable to disregard evidence and a strong likelihood that the effect of the
8 misconduct would be “devastating” to the defendant. *See Greer*, 483 U.S. at 766 n.8; *Tan*,
9 413 F.3d at 1115-16 (finding trial fair where jury received instructions five different times
10 to consider only the evidence presented, and not its sympathy for the victim’s life story).
11 In light of the state appellate court’s observation that the remarks were “brief and relatively
12 mild,” (Op. at 31), the Court is not persuaded that this presumption has been overcome.
13 *See Greer*, 483 U.S. at 766 n.8. Therefore, it is not reasonably likely that the jury would
14 have been unable to disregard the prosecutor’s improper appeal to their passion or
15 prejudice and follow the court’s instruction to “not let sympathy, bias, prejudice, or public
16 opinion influence your decision,” and that “[n]othing that the attorneys say is evidence.”
17 *See supra* at 34; *see Richardson v. Marsh*, 481 U.S. at 206. Accordingly, Nguyen is not
18 entitled to habeas relief on this claim.

19 In sum, the state courts’ rejection of Nguyen’s ineffective assistance of counsel
20 claims was not contrary to, or involved an unreasonable application of, clearly established
21 Supreme Court precedent. *See* 28 U.S.C. § 2254(d).

22 **IV. Cumulative Error**

23 Nguyen’s final claim is that the cumulative effect of the alleged trial court errors
24 and counsel’s ineffective assistance entitles him to habeas relief. (Pet. Attach. at 32.) In
25 some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the
26 cumulative effect of several errors may still prejudice a defendant so much that his
27 conviction must be overturned. *See, e.g., Alcala v. Woodford*, 334 F.3d 862, 893-895 (9th
28

1 Cir. 2003) (reversing conviction where multiple constitutional errors hindered defendant's
2 efforts to challenge every important element of proof offered by prosecution). However,
3 where there is no single constitutional error existing, nothing can accumulate to the level
4 of a constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

5 Here, Nguyen has not demonstrated that there was even one constitutional error.
6 The state courts rejected this claim because there were no errors. (Op. at 32.) Nguyen
7 may disagree with the decisions of the state courts, but he has not shown that they were
8 unreasonable under clearly established federal law. Accordingly, his claim of cumulative
9 error must be denied.

10

11 CONCLUSION

12 The state courts' adjudication of Nguyen's claims did not result in decisions that
13 were contrary to, or involved an unreasonable application of, clearly established federal
14 law, nor did they result in decisions that were based on an unreasonable determination of
15 the facts in light of the evidence presented in the state court proceeding. Accordingly, the
16 petition is DENIED.

17 A certificate of appealability will not issue. Reasonable jurists would not "find the
18 district court's assessment of the constitutional claims debatable or wrong." *Slack v.*
19 *McDaniel*, 529 U.S. 473, 484 (2000). Nguyen may seek a certificate of appealability from
20 the Ninth Circuit.

21

The Clerk shall enter judgment in favor of respondent and close the file.

22

IT IS SO ORDERED.

23

Dated: March 14, 2014

24



WILLIAM H. ORRICK
United States District Judge

25

26

27

28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ROT V NGUYEN,

Case Number: CV12-00616 WHO

Plaintiff,

CERTIFICATE OF SERVICE

v.

MATTHEW CATE et al,

Defendant.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 14, 2014, I SERVED a true and correct copy of the attached, by placing said copy in a postage paid envelope addressed to the person hereinafter listed, by depositing said envelope in the U.S. Mail.

Rot Van Nguyen AB-2155
California Institute for Men
P.O. Box 500
Chino, CA 91708-500

Dated: March 14, 2014

Jean M. Davis
Richard W. Wieking, Clerk
By: Jean Davis, Deputy Clerk